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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918

No. 874

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EDWARD A. RUMELY, *Appellant ~~Appellee~~*,

*vs.*

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and SAMUEL M. HITCHCOCK, United States Commissioner for the Southern District of New York, Appellees.

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Appeal from the District Court of the United States for the Southern District of New York.

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## BRIEF AND ARGUMENT FOR THE APPELLANT

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## INDEX


| | PAGE |
|---|---|
| INTRODUCTION: | 1 |
| The Prior Proceedings in New York Against the Appellant, Based on the Same Transaction | 2 |
| The Position of the Appellant | 7 |
| The Specific Points Relied Upon by the Appellant on this Appeal | 11 |
| Errors Relied Upon | 12 |
| Relevant Provisions of the Trading with the enemy Act | 14 |
| ARGUMENT | 16 |
| POINT 1: The District Court erred in refusing to consider the appellant's plea that there was no probable cause to believe that he had been guilty of the offense charged in the Washington indictment, because he could not be compelled to make a report to the Alien Property Custodian of the facts alleged in the Washington indictment as that would compel him in a criminal case to be a witness against himself; and that plea should have been sustained | 16 |
| (1) The Appellant's Plea as to Self-Incrimination was Valid | 17 |
| (A) The Provisions of the Act | 17 |

PAGE

(B) By uncontroverted evidence it clearly appeared that the appellant "traded" for the benefit of, and with, the S. S. McClure Newspaper Corporation..... 18

(C) By uncontroverted evidence it clearly appeared that, on the assumption that the appellant held the stock of the McClure Corporation on behalf of the Imperial German Government, the above "trading" by the appellant for that corporation was for the benefit of that government ..... 23

(D) By uncontroverted evidence, therefore, it clearly appeared (under the assumption in question) that the appellant was guilty of the offense of trading with the enemy under Section 3 of the Act. 25

(E) The rendition of the report, the failure to file which is the basis of the Washington indictment, would therefore tend to disclose that the appellant was guilty of a crime under the Trading with the enemy Act ..... 25

(F) Under the Fifth Amendment the appellant could not be compelled to make that disclosure..... 28

(G) There was hence no probable cause to believe that the appellant had been guilty of the offense alleged in the Washington indictment ..... 32

PAGE

(2) The District Court Erred in Refusing to Consider the Appellant's Plea as to Self-Incrimination..... 32
(A) The appellant does not attack the general constitutionality of Section 7 (a) of the Act..... 33
(B) The appellant is within the rule in the Henry case..... 35

POINT II: The District Court erred in holding that there was probable cause to believe that the appellant had committed within the District of Columbia (and only there) the offense charged by the Washington indictment..... 38
(A) The appellant was not personally present in the District of Columbia at the time of the alleged offense.. 38
(B) The appellant was under no duty to make the report in question in the District of Columbia (and only there), and the situs of the alleged omission to perform such duty was therefore not within that district.. 39

POINT III: The District Court erred in refusing to hold that the removal of the appellant to the District of Columbia would involve an invasion of his constitutional right to a speedy trial on the New York indictments..... 46
(A) The unreasonable delay in the trial of the New York indictments caused by these removal proceedings.. 46
(B) This point is properly raised in these *habeas corpus* proceedings..... 49

PAGE

POINT IV: Before granting its consent to the removal of the appellant from the Southern District of New York, the District Court should have required the Government to state its reasons for demanding such removal and should have given the appellant an opportunity to reply thereto..... 50

(A) The consent of the District Court to the removal was necessary..... 50

(B) How the consent of the District Court was obtained..... 53

(C) This question is not academic.... 56

CONCLUSION: The order of the District Court should be reversed and the appellant discharged from custody..... 57

CASES CITED

PAGE

Beavers *v.* Haubert, 198 U. S. 77..47, 51, 52, 53
Burr's Trial 1, page 244..... 28

Counselman *v.* Hitchcock, 142 U. S. 547.. 28, 29
City of St. Louis *v.* Williams, 235 Mo. 503. 30

Ex Parte Kneedler, 243 Mo. 632..... 30, 31

Green *v.* Henkel, 183 U. S. 249..... 38

Haas *v.* Henkel, 216 U. S. 462.48, 49, 51, 52, 53, 54
Henry *v.* Henkel, 235 U. S. 219..... 32, 51
Hyde *v.* Shine, 199 U. S. 62..... 9, 57

In re Johnson, 167 U. S. 125..... 51
In re Podolin, 205 Fed. 563, 210 Fed. 97... 33, 34
In re Tillinghast, 233 Fed. 712..... 48

New York Central & H. R. R. Co. *v.* United States, 166 Fed. 267.....40, 43, 44

People *v.* Henwood, 123 Mich. 317..... 30
Peckham *v.* Henkel, 216 U. S. 483..... 52, 56
People *v.* Rosenheimer, 209 N. Y. 115; 146 App. Div. 875..... 30, 31
People *v.* Schneider, 139 Mich. 673..... 30
Price *v.* Henkel, 216 U. S. 488..... 38, 51

State *v.* Hanson, 16 No. Dak. 347..... 30, 57

Tinsley *v.* Treat, 205 U. S. 20..... 38

United States *v.* Lombardo, 241 U. S. 73.40, 43, 44

Wilson *v.* United States, 211 U. S. 361.... 29, 31

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THOMAS D. MCCARTHY, United States Marshal in and for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York.

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## Brief for the Appellant.

### INTRODUCTION.

This is an appeal from an order of the District Court for the Southern District of New York entered on February 5, 1919, dismissing writs of *habeas corpus* and *certiorari* which were sued out by the appellant to determine the legality of his detention under a commitment issued by the ap-

pellee, Samuel M. Hitchcock, Esquire, United States Commissioner, whereby the appellant was committed to the custody of the appellee, Thomas D. McCarthy, United States Marshal for the Southern District of New York, pending the issuance by a District Judge of a warrant for the appellant's removal to the District of Columbia for trial on an indictment which had been returned against him by the Grand Jury of that District on December 2, 1918. (R., p. 206). This indictment will be referred to as the "Washington indictment". The offense charged was a violation of Sections 7 and 16 of the Act of Congress approved October 6, 1917, known as the "Trading with the enemy Act", it being alleged that the appellant had failed to report to the Alien Property Custodian, as required by the Act, the alleged fact (first count) that he held certain shares of capital stock of the S. S. McClure Newspaper Corporation on behalf of the Imperial German Government and the alleged fact (second count) that he was indebted to the Imperial German Government to the extent of over a million dollars. (Government's Exhibit 1, R., pp. 8, 199).

**The Prior Proceedings in New York Against the Appellant, Based on the Same Transaction.**

On July 8, 1918, the appellant was arrested in New York City on a warrant charging him with perjury in making a false report to the Alien Property Custodian. (R., p. 33.) This was followed on August 2, 1918, by two indictments returned by the Grand Jury for the Southern District of New York, upon which the appellant was arraigned on that day, pleaded not guilty and was released on

$35,000 bail. (R., p. 33.) The appellant is now awaiting trial on these indictments. The first of these indictments (which is against the appellant alone for perjury and which we shall refer to as the "New York indictment") charges that the appellant's report of December 4, 1917, to the Alien Property Custodian was false in that in response to the requirements of the report that he state property held by him for "alien enemies" and indebtedness owed by him to "alien enemies", he swore that the only item in this category was a $100,000 note executed by him and payable to one Herman Sielcken, whereas, it is charged, he was not indebted to Sielcken at all, but was indebted to the Imperial German Government to the extent of over a million dollars and held certain shares of the capital stock of the S. S. McClure Newspaper Corporation for the Imperial German Government. (Appellant's Exhibit B; R., p. 174.)

The Government has admitted that the alleged indebtedness to the Imperial German Government referred to in the New York indictment is the same as the alleged indebtedness referred to in the Washington indictment and that the S. S. McClure Newspaper Corporation referred to in each indictment is the same corporation. (R., pp. 40-42).*

Indeed, the Government does not dispute that both indictments relate to the same transaction and involve substantially the same issues of fact, namely, whether the appellant was indebted to Herman Sielcken to the extent of $100,000 or to the Imperial German Government to the extent of over a million dollars and whether he did or did not hold shares of the capital

* For further proof as to the identity of the alleged indebtedness and shares of stock of this corporation referred to in these indictments see Record, pp. 43, 48, 49.

stock of the S. S. McClure Newspaper Corporation for the Imperial German Government. On the contrary, the Government has, as we shall show below, relied upon the fact that the issues are substantially the same and, in respect of any effect to be given in these proceedings to the New York indictment, the Government relies solely upon the fact that the technical crime charged in the Washington indictment (*i. e.*, failure to report under the Trading with the enemy Act) is different from the technical crime charged in the New York indictment (*i. e.*, perjury for making a false report under that Act). Undoubtedly the two offenses—although involving the same transaction and substantially the same major issues—are technically different, but the difference is effected simply by an adroit method of pleading. In New York the Government charges that the defendant made a false report; in Washington it charges in effect that he made no report at all.*

On the ground that the two indictments technically charge different offenses, the Commissioner excluded them from evidence, as well as other proof relating to the proceedings under them (R., pp. 31, 39-40, 151-152). The District Court held that the exclusion of the indictments was error but that they were not material** (R., pp. 202-203).

---

* In this connection it is instructive to note that in the second of the New York indictments (which also involves the same transaction) and is against the appellant and one S. Walter Kaufmann for a conspiracy to fail to report the same alleged enemy owned indebtedness and stock, the making of this report of December 4, 1917, stating the $100,000 indebtedness to Herman Sielcken, is alleged as one of the overt acts evidencing the conspicary to fail to report the indebtedness of over a million dollars to the Imperial German Government. (Appellant's Ex. A.; R., p. 169).

** We assume that this ruling of Judge Mayer applies also to the other evidence relating to the proceedings under the New York indictments and accordingly we have referred to this evidence in the present brief.

On November 22, 1918, the appellant made a motion before the District Court in the proceedings under the New York indictment for a commission to examine certain witnesses in Switzerland. The argument on this motion was postponed until November 29, 1918, at the Government's request, and on that day the Government asked the District Court to postpone the hearing of the motion on the ground that the Grand Jury for the District of Columbia had just voted an indictment against this appellant; that such indictment involved the same transaction and substantially the same issues as the New York indictment; that the appellant would undoubtedly, therefore, move under the Washington indictment for a commission similar to that moved for under the New York indictment; that the Government proposed to try the Washington indictment before the New York indictment; that the District Court for the District of Columbia would thus be "the court of primary jurisdiction" and the District Court for the Southern District of New York, the "court of secondary jurisdiction" and that, therefore, the latter court should postpone the hearing on the motion until the appellant had been arraigned in the District of Columbia and had made his motion before that Court for a commission to examine witnesses abroad, and that then the New York court could be guided by the decision of the court in Washington on that motion. The appellant's counsel naturally protested against this suggestion, pointed out that the appellant from July 8, or for a period of over four months since his arrest in New York, had been preparing his defense to the charges in New York; that the New York indictments still stood and that there was no intimation by the Government that they would ultimately be quashed; that, therefore, the appellant

had a right to proceed to complete his defense to the New York indictments by the examination of witnesses abroad and that the suggestion that the District Court for the Southern District of New York should defer to the action of the Supreme Court of the District of Columbia was manifestly improper. Judge Augustus Hand agreed with the appellant's counsel and directed that the argument on the merits of the motion proceed. The Government having admitted that the testimony abroad desired by the appellant was material and necessary to his defense, there was little to be said in opposition to the motion on the merits and Judge Hand rendered his decision from the bench granting the motion. A few days later, on December 10, 1918, the appellant was arraigned before Commissioner Hitchcock in the present proceedings to remove him to the District of Columbia. Several hearings were held before the Commissioner at which both the Government and the appellant introduced evidence, and on January 18, 1919, the Commissioner overruled all the contentions in opposition to the appellant's removal and committed the defendant to the custody of the Marshal (R., pp. 169, 7). The appellant thereupon sued out the writs of *habeas corpus* and *certiorari* (R., pp. 14, 18). The hearing on these writs was held on January 25, 1919, and on February 5, 1919, the District Court entered the orders dismissing the writs and allowing this appeal (R., pp. 206-207, 209).

On February 15, 1919 (the intervening time of counsel having been taken up by the conduct of the removal proceedings) the appellant's counsel wrote the Assistant United States Attorney at New York stating that they were ready to have the commission issued in the New York proceedings and inquiring whether the Government was

ready to arrange for its representatives and those of the appellant to go abroad for the execution of the commission. On February 18, 1919, the United States Attorney replied that the representative of the Government could not take the trip before the first of May because of other engagements and further indicated that the commission should not issue until the removal proceedings and "all the preliminary proceedings had been cleared away".*

**The Position of the Appellant.**

In the hearings before the Commissioner the appellant proved that immediately after the proceedings were instituted in New York he engaged counsel to prepare his defense, that they had ever since been continuously employed in this work, and that the enormous mass of books and papers that were involved in the case, almost enough to fill a room, had been collected in New York. It was also shown that his defense would require the production of bank records, files of the *Evening Mail* and other documents forming part of working organizations in New York which it would be difficult to move. He also showed that many of his witnesses resided in New York and he offered to prove (the offer being excluded by the Commissioner) that many of his witnesses would be members of the *Evening Mail* organization in New York, whom it would be impracticable to summon to other jurisdictions *en masse.* (R., pp. 35-36, 85-91.)

* While these communications are not in the transcript of record before this Court, we have taken the liberty of referring to them in view of the statement of the Solicitor General contained in his motion papers to advance the case on the calendar of this Court, to the effect that "depositions in Europe are to be taken by the appellant, which are deferred because of the pendency of this appeal."

The situation in which the appellant thus finds himself is this: After a period of over six months in which he has been preparing to meet the charges against him in New York—his home community and the place where most of his witnesses reside and where most of the documentary evidence is located—and after the Court there has granted him permission to secure abroad testimony material and necessary to his defense, the Government suddenly attempts to transfer the situs of the case to the District of Columbia, with the tremendous hardship and expense on the defendant which this entails, and then employs this attempt as an excuse for delaying the issuance of the commission abroad and the trial of the case in New York. No claim is made by the Government that this belated attempt to remove the appellant to Washington was due to any recent discovery of fact or recent decisions of law. On the contrary, the indictment in Washington is based on the same transaction and the same major issues that form the subject of the New York indictment handed down months before. *And the most remarkable aspect of this whole extraordinary proceeding is that the Government, in response to the appellant's insistence that he be informed of its reasons for this sudden shift so that he might address the District Court on the question of whether those reasons should prevail, not only refused to do so, but on the contrary most earnestly requested the District Court not to compel it to disclose those reasons!*

We do not deem it meet before this Court to designate the tactics thus employed and we readily admit that an accused is not entitled to be ad-

vised of all the motives or policies underlying the conduct of criminal proceedings against him. The appellant asserts no such right but does believe, that under the circumstances here presented, it is incumbent upon the Government to present its reasons why the jurisdiction of the District Court for the Southern District of New York should be ousted, so that the appellant may have a proper opportunity to present his case on that question. We most urgently press upon this Court the appellant's plea that the exercise by the Government of its alleged right under the Revised Statutes to remove him from the jurisdiction it first selected, to another jurisdiction which it selected months later, will result in a severe and demonstrable hardship vitally prejudicial to his right adequately to meet the charges against him, and, as we shall argue in this brief, violative of his constitutional rights as an American citizen. We respectively submit that the present case, beyond any that have been presented to this Court, calls forth the thought reflected in the following quotation from the opinion in *Hyde* v. *Shine* (1904), 199 U. S. 62, at page 78:

> "But we do not wish to be understood as approving the practice of indicting citizens of distant States in the courts of this District, where an indictment will lie in the State of the domicil of such person, unless in exceptional cases where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not to be subjected, if the case can be tried in a court of his own jurisdiction."

The Commissioner expressly stated that he would not hold the appellant for removal if the Washington indictment had charged the identical crime that was charged in the New York indictment (R., p. 33) and the opinion of the District Court indicates that it probably concurred in this idea. We believe that the technical variation in the two indictments is not controlling.

We recognize the rule repeatedly laid down by this Court that a writ of *habeas corpus* is not equivalent to and cannot be used as a writ of error and that, therefore, the questions open on an appeal of this nature are limited. We submit, however, that even within these limitations the appellant is entitled to a favorable decision. We may here add that at the hearing before the Commissioner, the appellant did not attempt to introduce any evidence whatsoever on the ultimate issues of the case, that is as to whether he did or did not hold shares of stock of the S. S. McClure Newspaper Corporation on behalf of the Imperial German Government or did owe $100,000 to Herman Sielcken or over a million dollars to the Imperial German Government. The appellant's counsel recognized that the proper tribunal for a determination of these questions was the trial court either in New York or Washington and, therefore, the evidence before the Commissioner was confined solely to issues as to the locus of the alleged crime and other questions bearing upon the propriety of the attempted removal. As to the merits of the ultimate issues in the case the appellant can conserve his rights by a writ of error, if required, from the decision of the trial court, but for the protection of his right to a prompt trial of his

case in New York and his right not to be removed to the District of Columbia while he is endeavoring to meet the charges in New York, it is apparent that the writs of *habeas corpus* and *certiorari* are his only remedies. If he is compelled to submit to trial in the District of Columbia the injury to his case by reason of such removal will have been irrevocably suffered when the trial is had and to repair that injury a writ of error from the decision of the trial court will avail him nothing.

**The Specific Points Relied Upon By the Appellant On This Appeal.**

The principal points relied upon by the appellant before this Court are as follows:

1. That the District Court erred in refusing to pass upon the appellant's plea of his constitutional privilege against self incrimination. (Point I, infra, p. 16.)

2. That the District Court erred in finding reasonable cause to believe that the offense charged by the Washington indictment was cognizable by (and only by) the Supreme Court for the District of Columbia. (Point II, infra, p. 38.)

3. That the District Court erred in not holding that the removal of the appellant would violate his constitutional right to a speedy trial of the New York indictment. (Point III, infra, p. 46.)

4. That the District Court should have required the Government to state the reasons for the attempted removal and to have given the appellant an opportunity to reply thereto. (Point IV, infra, p. 50.)

**Errors Relied Upon.**

The errors in which we conceive the learned Judge below to have fallen are as follows:

In discharging the writ of *habeas corpus* and *certiorari* and remanding the petitioner to custody; in holding that the petitioner's restraint and detention were without authority of law and that the petitioner was not deprived of his liberty in violation of his rights, privileges and immunities under the Constitution and laws of the United States, (1st, 2nd and 3rd Assignments, R. p. 210); in holding that the Commissioner was not without authority, power or jurisdiction to entertain any charges against the petitioner or to act or to proceed in the premises (4th Assignment, R. p. 210); in declining to hold that the Commissioner was without jurisdiction to commit the petitioner for the reason that the petitioner was under indictment in the Southern District of New York and had been arraigned and admitted to bail under such indictment and that the consent of the District Court for the Southern District of New York had not been obtained (5th assignment, R., p. 211); in holding that the indictment charged a crime or offense against the laws of the United States and that the evidence given before the Commissioner showed probable cause to believe that the petitioner had been guilty of any such crime or offense (8th and 9th Assignments, R. p. 211); in failing to hold and decide that the restraint of the petitioner was in violation of the provisions of Article Sixth of the Amendments to the Constitution of the United States for the reason that upon the proof before the Commissioner and before the said Court it was shown that the offense charged in

the indictment was not committed in the District of Columbia (15th Assignment, R. p. 211); in holding that the Trading with the enemy Act required reports under Section 7 (a) of said Act to be made in the District of Columbia and in holding that the said Trading with the enemy Act required reports under said Section to be made at the office of the Alien Property Custodian (16th and 17th Assignments, R. p. 212); in holding that Section 7 (a) of the Trading with the enemy Act required any report to be made by the petitioner with respect to the facts specified in the indictment (18th Assignment, R. p. 212); in failing to hold and decide that the enforcement of the said Act as so construed would be in violation of the rights granted the petitioner under the Fifth Amendment to the Constitution of the United States (19th Assignment, R. p. 212); in holding that the questions as to the infringement of the constitutional rights of the petitioner by the enforcement of said Act as so construed should not be determined in the *habeas corpus* proceedings (20th Assignment, R. p. 212); in holding that the Supreme Court for the District of Columbia had exclusive jurisdiction of the alleged offenses charged in the indictment (21st Assignment, R. p. 212); in not holding and deciding that the petitioner was deprived of his liberty without due process of the law within the provision of the Fifth Amendment to the Constitution of the United States (22nd Assignment, R. p. 212); and in citing Section 1014 of the Revised Statutes as authority for the petitioner's removal to the District of Columbia upon the facts disclosed in said petition and on the evidence before said Commissioner and before the District Court for the Southern District of New York.

**Relevant Provisions of the Trading with the enemy Act.**

For the convenience of the Court we print here certain important provisions of the Trading with the enemy Act referred to in the following pages:

*Section 7* (*a*) provides in part as follows:

> "Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath, containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February third, nineteen hundred and seventeen: Provided, That the name of any person shall be stricken from the said report by the Alien Property Custodian either temporarily or permanently, when he shall be satisfied that such person is not an enemy or ally of enemy.
>
> The President may extend the time for fil-

ing the lists or reports required by this section for an additional period not exceeding ninety days."

There is no specific penalty provided in the Act for the failure to make the reports referred to in Section 7 (a), but Section 16 provides a general penalty for violation of the Act as follows:

"SEC. 16. That whoever shall wilfully violate any of the provisions of this Act or of any license, rule or regulation issued thereunder, and whoever shall wilfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a naturalized person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States."

ARGUMENT.

## POINT I.

**The District Court erred in refusing to consider the appellant's plea that there was no probable cause to believe that he had been guilty of the offense charged in the Washington indictment, because he could not be compelled to make a report to the Alien Property Custodian of the facts alleged in the Washington indictment as that would compel him in a criminal case to be a witness against himself; and that plea should have been sustained.**

*Prima facie* evidence of the two basic facts of enemy-owned stock and indebtedness alleged in the Washington indictment, was produced by the Government through the introduction at the hearing before the Commissioner of a certified copy of that indictment. As stated by the learned District Judge, these allegations were not controverted by the appellant and it must, therefore, *for the purposes of this proceeding*, be taken as true that

> "(1) On October 6, 1917, Rumely had stock of the S. S. McClure Newspaper Corporation that he held for and on behalf of the German Government, and that during the period from October 6, 1917, to December 20, 1917, the day to which the President extended the time for making reports, Rumely did not report the fact to the Alien Property Custodian, and that
>
> (2) On October 6, 1917, Rumely was indebted to the German Government in the sum

of $1,451,700.00, and that during the period aforesaid he did not report that fact to the Alien Property Custodian" (R. p. 202).

**(1) The Appellant's Plea as to Self-Incrimination was Valid.**

(A) The Provisions of the Act.

Section 3 of the Trading with the enemy Act provides:

> (a) "It shall be unlawful for any person in the United States, except with the license of the President, granted to such person, or to the enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy."

The Act further provides that such license must be applied for within thirty days after the passage of the Act. The Act went into effect October 6, 1917, and the period within which the license must have been obtained, therefore, expired on November 5, 1917. The undisputed evidence showed that no such license had ever been obtained (R., pp. 48, 82, 83), and if, therefore, after November 5, 1917, the appellant "traded" or attempted to "trade directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of," the Imperial German Government, he was guilty of an offense

against the United States and was subject to the penalty imposed by Section 16 of the Act.

The words "to trade" are defined in Section 2 of the Act as follows:

> "The words 'to trade' as used herein shall be deemed to mean:
>
> (a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.
>
> (b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.
>
> (c) Enter into, carry on, complete, or perform any contract, agreement or obligation.
>
> (d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign or otherwise dispose of, or receive any form of property.
>
> (e) To have any form of business or commercial communication or intercourse with."

(B) By Uncontroverted Evidence it Clearly Appeared that the Appellant "Traded" for the Benefit of, and with, the S. S. McClure Newspaper Corporation.

The following facts were established by the appellant before the Commissioner by evidence which was not controverted by the Government:

The appellant organized the S. S. McClure Newspaper Corporation under the laws of New York in May, 1915, and has been connected with this corporation since that time as stockholder, officer and director. (R. p. 37). He occupied the offices of director and member of the Finance Committee since June 9, 1915, and was managing Vice-President from that date until his election as President in April, 1918 (R. 37-38). The By-Laws

of the corporation (Appellant's Exhibit G, R., p. 193), provide (Article IV, Section 8), that

> "The Vice-President shall be the executive head of the corporation, control the general and editorial policy of the corporation, and have general supervision over the business and over the several officers of the Corporation, subject, however, to the control of the Board of Directors, and in financial matters of which the Finance Committee has control, he shall also be subject to the control of the Finance Committee."

He also held the position of Secretary for a time (R., p. 38). The principal business of the S. S. McClure Newspaper Corporation was the holding of stock of the Mail and Express Company, the owner and publisher of the New York newspaper known as the Evening Mail, and the financing of the operations of that Company (R., pp. 43, 80-81). In May, 1915, the McClure Corporation acquired 3,800 shares out of a total issue of 4,000 shares of the Mail and Express Company stock (R. p. 43). The financing of the Mail and Express Company was carried on by the McClure Newspaper Corporation through the loan of moneys advanced from time to time against the notes of the Mail and Express Company or through the endorsement of the notes of the latter Company by the McClure Corporation and their discount at banks (R. pp. 43-45, 76-80). Within the period from November 7, 1917, to December 20, 1917, notes of the Mail and Express Company aggregating more than $50,000 were endorsed by the Newspaper Corporation and their discount secured at the National Park Bank (R., p. 45; Appellant's Exhibit O, R., p. 198). With respect to the ap-

pellant's participation in these transactions, he testified:

> "A. I went to the National Park Bank, to the officers who were known to me, and arranged for an increase in the line of credit, and agreed to pledge, to give my personal endorsement to the notes, and did so do, but I cannot state the exact date on which I began endorsing the notes, but some time within this period (*i. e.* between November 7th, 1917, and December 30, 1917).
>
> Q. Did you personally endorse some of these notes to which we have been referring?
>
> A. I agreed to do so, and I did.
>
> Q. You did actually personally endorse them?
>
> A. Yes, sir.
>
> Q. For the benefit of——
>
> A. The S. S. McClure Newspaper Corporation.
>
> Q. And in order to secure the discount of the notes——
>
> A. And in order to make the notes acceptable for discount at the National Park Bank." (R. p. 76).

He further testified that he pledged bonds belonging to him personally as security for the notes discounted (R., p. 77).

Appellant's Exhibit O (R., p. 198) was a schedule of the receipts and disbursements of the S. S. McClure Newspaper Corporation during the month of December, 1917, and reference was made to various transactions between the two companies, including certain transactions relating to Liberty Bonds. In response to an inquiry as to the appellant's participation in this series of transactions he stated:

> "A. I directed that the discount should be made by the S. S. McClure Newspaper Cor-

poration, to purchase the Liberty Loan, and directed that the S. S. McClure Newspaper Corporation should accept from the Mail and Express Company, a payment on those bonds in installments as the moneys were collected from the employees and officers of the company, and I arranged for the credit.

Q. Credit where?

A. I think it was at the Atlantic National Bank." (R., p. 80.)

In addition to describing various other transactions in respect to the McClure Corporation, the appellant testified as follows:

"Q. In addition to the various transactions to which you have testified, did you have any further personal transaction or transactions with the S. S. McClure Newspaper Corporation in November, 1917?

A. I purchased from the S. S. McClure Newspaper Corporation $200,000 of the notes that it held against the Mail and Express Company for $100,000 which I paid by the issuance of my personal note for $100,000, with four per cent. interest.

Q. Payable to whom?

A. Payable to the S. S. McClure Newspaper Corporation.

Q. When was that done?

A. It was between November 10th and 12th.

Q. 1917?

A. 1917." (R., p. 82.)

Between November 10 and 12, 1917, the McClure Corporation distributed its assets except the note of the appellant of $100,000 and on distribution these assets were received by the appellant who was thereafter the sole stockholder of the corporation except with respect to one or two shares (R., pp. 103-104).

From this uncontroverted evidence it appears:

*First:* That in the period between November 7 and December 20, 1917, the appellant, for the purpose of placing the McClure Corporation in funds, personally endorsed notes of the Mail and Express Company which had been endorsed by the McClure Corporation, aggregating over $50,000 in amount, arranged for the discount of these notes at the National Park Bank and also pledged bonds personally held by him as security for these notes.

It is clear that these activities constituted a trading within the meaning of the Act for they come squarely within subdivision (a) of section 2 (*supra,* p. 18)—"*give security for the payment or satisfaction of any debt or obligation,*" and within subdivision (b) of the same section—"*indorse any negotiable instrument or chose in action,*" and within subdivision (c) of the same section—"*loan or extend credit.*"

It is equally clear that this constituted a *trading,* "for, or on account of, or in behalf of, or for the benefit of" the McClure Corporation, within the meaning of section 3 (*supra,* p. 17).

*Second*: That, within the same period, the appellant purchased from the McClure Corporation $200,000 face amount of notes of the Mail and Express Company for $100,000 which the appellant paid for by the delivery to the McClure Corporation of his personal note for $100,000 and that he received certain assets thereof on the reduction of the capital stock of that Corporation (*supra,* p. 21).

This also clearly constituted "trading" within the meaning of the Act for it squarely falls within subdivision (c) of section 2—"*enter into, carry on, complete or perform, any contract, agreement or obligation*"; and subdivision (d)—"*buy or sell * * * trade in, deal with, exchange, transmit, transfer, assign or otherwise dispose of, or receive any form of property.*" It is equally clear that this constituted *trading* "with, to or from" the McClure Corporation within the meaning of section 3.

*Third*: The uncontroverted evidence shows various other transactions, within the same period, involving the appellant and the McClure Corporation (particularly the Liberty Loan bond purchases, the appellant's services rendered to the Corporation and its payment therefor), which constituted "trading" with or for the benefit of the McClure Corporation within the meaning of one or more of the subdivisions of section 2, which is very comprehensive, subdivision (e) covering "any form of business or commercial communication or intercourse with" (R., pp. 44-46, 149-151).

(C) By Uncontroverted Evidence It Clearly Appeared That, On the Assumption That the Appellant Held the Stock of the McClure Corporation On Behalf of the Imperial German Government, the Above "Trading" By the Appellant For That Corporation Was For the Benefit of That Government.

The appellant organized the McClure Corporation about May, 1915. Approximately seventy-five to ninety per cent. of its outstanding stock was

pledged by the appellant with one Walter Lyon to secure four promissory notes executed by the appellant to Lyon on June 1, 1915, January 4, 1917, February 20, 1917 and April 19, 1917, respectively, aggregating $1,451,700 (R., p. 60, Appellant's Exhibits H, I, J, K, and the duplicate originals Government's Exhibits 4, 5, 6 and 7, R., pp. 193-197-199).

In September, 1917, the certificates for this stock were returned to the appellant, and after October 1, 1917, stood in the appellant's name (R., p. 84). After November 6th of that year all of the stock of the company stood in his name, with the possible exception of a share or two (R., *id.*).

It is clear that if, as the Government alleges and as must be deemed true in these proceedings, the Imperial German Government owned this stock and the appellant held it on behalf of that government, the indorsing of the notes of the McClure Corporation for discount at the National Park Bank, the pledging of his own bonds therefor by the appellant and the various other transactions by the appellant between November 7, 1917, and December 20, 1917, which constituted "trading" with or for the McClure Corporation as above shown, constituted "trading" with or for the benefit of the Imperial German Government. It cannot be seriously contended that, within the meaning of the Trading with the enemy Act, these transactions were not for the benefit of that government merely because it owned the stock and operated through the medium of a New York corporation. Such a contention of course would largely defeat the purposes of the Act by permitting alien enemies to secure immunity through the medium of the corporate entity.

(D.) By Uncontroverted Evidence, Therefore, it Clearly Appeared (Under the Assumption in Question) that the Appellant was Guilty of the Offense of Trading with the Enemy Under Section 3 of the Act.

This inevitably follows from the preceding discussion.

(E.) The Rendition of the Report, the Failure to File Which is the Basis of the Washington Indictment, Would Therefore Tend to Disclose that the Appellant was Guilty of a Crime Under the Trading with the Enemy Act.

If the appellant had, pursuant to the provisions of Section 7 (a) of the Act, reported to the Alien Property Custodian that he held the McClure Corporation stock for the Imperial German Government, as the first count of the Washington indictment alleges he was obliged to do, this disclosure would have tended to show that he was guilty under the Act of the offense of trading without a license. It is true that the disclosure of this alleged fact alone would not have shown the commission of a crime but it would have *tended* in that direction by furnishing means through which its commission could be ascertained. And this is sufficient in order to invoke the constitutional privilege against self-incrimination [Cases infra]. In the present case the tendency to disclose the crime would not have been remote but would almost inevitably have lead to such a disclosure, for if it had been reported that the Imperial German

Government owned a controlling interest in the McClure Newspaper Corporation, an investigation would immediately have been instituted by the Alien Property Custodian and a very brief and simple examination would have at once disclosed the transactions above mentioned.

With respect to the second count of the Washington indictment, the situation is similar. In its briefs below, the Government endeavored to draw a distinction between the two counts in respect of the point under discussion and argued that since the second count of the Washington indictment merely alleged that the appellant was indebted to the Imperial German Government and did not allege that he held the McClure Corporation stock on behalf of that government, a disclosure of such indebtedness would not have tended to disclose that his transactions for that corporation and, therefore, for the benefit of its stockholders, were for the benefit of the Imperial German Government. It was therefore contended that, as respects the Government's right of removal on the second count of the Washington indictment, the appellant's point was not well taken.

The first answer to this contention of the Government is that so far as these proceedings are concerned, both counts of the Washington indictment are in evidence for all purposes of the proceeding and since no evidence was submitted in rebuttal of the allegation contained in the first count as to the ownership by the Imperial German Government of the stock, that allegation must be taken as true with respect to a removal under either count.

The second answer is that the result is the same even if the first count be disregarded. The identity of the alleged indebtedness of the appellant to the Imperial German Govern-

ment referred to in that count and the indebtedness evidenced or purported to be evidenced by the above four notes of the appellant to Walter Lyon for that amount was established by the appellant's testimony (R., p. 49) and, as already stated, from seventy-five to ninety per cent. of the outstanding stock of the McClure Corporation was pledged to secure these notes (R., pp. 83-84). It follows that any disclosure of this indebtedness to the Imperial German Government would likewise have carried with it, or have tended so to do, a disclosure of the interest of that Government in this stock. In this connection, it may be noted that the blank forms provided for the report to the Alien Property Custodian (see Appellant's Exhibit D, R., pp. 187-188) require in Schedule 8, that in making a return as to a debt owed to an enemy, if the indebtedness is secured in any way, the security must be described and its estimated value stated, so that a report of the alleged indebtedness here would of necessity have disclosed its relation to the pledged stock, and would have tended to show the commission by the appellant of the offense outlined above. It should also be observed that by the terms of the notes, they were payable at the option of the appellant in stock of the McClure Corporation pledged thereunder (Appellant's Exhibits H, I, J and K, Government's Exhibits 4, 5, 6 and 7, R., pp. 193-197, 199), so that any trading which would be for the benefit of the stockholders of the company would also enure directly to the advantage of the Imperial German Government as the holder of the indebtedness represented by such notes and secured by such stock.

(F) Under the Fifth Amendment the Appellant Could Not Be Compelled to Make That Disclosure.

We need only refer very briefly to the general principles heretofore enunciated by this Court in its prior decisions relative to the protection afforded by the Fifth Amendment to the Constitution of the United States against a defendant being compelled to give incriminating evidence against himself. It is not limited to the protection of a defendant upon the witness stand, but extends to any compulsory disclosure of an incriminating character, nor is it necessary that the facts, the disclosure of which is sought to be compelled, would in themselves show the commission of a crime. It is enough if they would *tend* to show such crime or furnish means by which its commission could be ascertained. The leading case is *Counselman* v. *Hitchcock* (1891) 142 U. S. 547, where this Court said on page 585:

> "It is a reasonable construction of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstances of his offense, or the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him.'"

This Court also quoted at length from the decision of Chief Justice Marshall in *Burr's Trial*, 1 Burr's Trial, 244, as follows:

> "According to their statement" (the counsel for the United States), "a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime.

> This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

In *Wilson* v. *United States* (1911) 221 U. S. 361, this Court declared that the privilege can be asserted although no prosecution had been instituted against the defendant and on page 379 said:

> "The privilege holds although the pursuit of the person required to produce has not yet begun; it is the incriminating tendency of the disclosure and not the tendency of the prosecution against the witness upon which the right depends." (Citing *Counselman* v. *Hitchcock, supra.*)

In its brief below, the Government in support of its contention that the requirement of the report in question from the appellant would not invade the appellant's constitutional right, cited various decisions of State courts, including the following:

*People* v. *Rosenheimer* (1913) 209 N. Y. 115.
*Ex parte Kneedler* (1912) 243 Mo. 632.
*City of St. Louis* v. *Williams* (1911) 235 Mo. 503.
*People* v. *Henwood* (1900) 123 Mich. 317
*People* v. *Schneider* (1905) 139 Mich. 673.
*State* v. *Hanson* (1907) 16 No. Dak. 347.

These cases are distinguishable on one or both of two grounds:

*First.*—They involve reports relative to the exercise of privileges, such as the use of streets or the sale of liquors, which the State can entirely prohibit and which it can therefore permit upon such conditions as it chooses, even to the waiver of the constitutional privilege with respect to self-incrimination. This is the express basis for the decision in the *Rosenheimer* case, and although some of the other cases cited do not indicate the ground of decision, it is submitted that they fall within the same class and are distinguishable from the present case on this, as well as the other ground hereafter stated.

*Second.*—It is elementary that a constitutional privilege cannot be asserted as a defense unless the rights of the defendant himself are affected. For this reason a corporation may not raise the ques-

tion as to whether an act requires the giving of incriminatory evidence, as the privileges of the Fifth Amendment do not extend to corporations. See *Wilson* v. *United States, supra.* So also an individual, before he can assert his privilege against self-incrimination, must establish that the evidence which is sought to be elicited would tend to incriminate him. The *Rosenheimer* case and the *Kneedler* case are but illustrations of this principle, because it did not appear in either of these cases that there was any threatened invasion of the rights of the respective defendants. This is recognized by the dissenting opinion of the court below in the *Rosenheimer* case (which was referred to with approval by the Court of Appeals) where it was said (146 App. Div. 875 at page 878):

> "It seems to me that if a compliance with the statute would, under the particular case, have required the witness to be a witness against himself in a criminal case, and so violate his rights under this constitutional provision, he was bound to plead the facts as a justification for a refusal to obey the statute."

In the *Kneedler* case, the Court stated on page 646:

> "But even if a constitutional right be involved, it is not necessary to invalidate the statute to secure its protection. If, in this particular case, the constitutional privilege justified the refusal to give the information exacted by the statute, that question can be raised in the defense to the pending prosecution."

The position of the defendants in these cases was that the inevitable results of the statutes in question would be to compel disclosures of an incriminating character and the respective courts

stated in these cases that the only point before them was whether a statute was unconstitutional where it might possibly, but would not necessarily, require the production of incriminating evidence. Under these circumstances, it was held that this possibility was not sufficient to render the entire statute unconstitutional, but the question was reserved whether in a particular case where the operation of a statute would violate the constitutional rights of a particular defendant, he could not, upon showing such fact, invoke the constitutional privilege. This is the question, and the only question, which the position of the appellant raises with respect to his claim of privilege under the Fifth Amendment.

(G.) THERE WAS HENCE NO PROBABLE CAUSE TO BELIEVE THAT THE APPELLANT HAD BEEN GUILTY OF THE OFFENSE ALLEGED IN THE WASHINGTON INDICTMENT.

If the appellant, on all the evidence before the Commissioner, clearly could not have been compelled under the Fifth Amendment to make the report in question, it follows that there was no probable cause to believe that he was guilty of the offense alleged in the Washington indictment, as that offense is predicated of a duty to make that report.

**(2). The District Court Erred in Refusing to Consider the Appellant's Plea as to Self-Incrimination.**

The learned District Judge did not consider the evidence presented with respect to this point, as he held that under the decision of *Henry* v. *Henkel*,

235 U. S. 219, the question here presented was not open to consideration in a *habeas corpus* proceeding. It is submitted, however, that the present case does not fall within the purview of the decision in the *Henry* case or the decisions in the other cases relied upon by the Government.

(A) The Appellant Does Not Attack the General Constitutionality of Section 7 (A) of the Act.

It is to be noted at the outset that the appellant does not assert that the provisions of 7 (a) of the Trading with the enemy Act are necessarily or generally unconstitutional but simply that as applied to him under the circumstances presented by the evidence in this proceeding, it is inoperative because of the protection afforded by the Fifth Amendment. At the beginning at least, the Government apparently misconceived the appellant's position on this point and laid great stress upon the extreme caution which a tribunal of first instance should exercise before declaring an Act of Congress unconstitutional.

The position of the appellant is analogous to that of a bankrupt who is required by the provisions of the Bankruptcy Act to file schedules of assets, and it has been held that when it is established that the filing of such schedules would disclose incriminating evidence, then the bankrupt cannot be required to file them. Thus, *in re Podolin,* (District Court, Eastern District of Pa., 1913), 205 Fed. 563, the Court ruled that the bankrupt could omit from his schedule any reference to a transaction which would tend to incriminate him. The Court stated on page 567:

> "(1) The referee's order of May 12, 1913, will be so modified, ex majori cautela, as to

> provide expressly that the bankrupts may omit from their schedules any reference to the transaction with Rudsky. They are still exposed to the danger of prosecution in connection with that transaction, and they should not be compelled to run the not remote risk of having their statements used against them in such a prosecution. The connection between such statements and the evidence required to sustain the prosecution is direct and immediate."

This holding was affirmed by the Circuit Court of Appeals for the Third Circuit. *In re Poolin,* 210 Fed. 97.

See also

> *Corpus Juris,* Sec. 34, p. 38;
> *Brandenburg on Bankruptcy,* 4th Edition 1917, Sec. 398, p. 308.

This aptly illustrates the position of the present appellant. As a bankrupt in the situation above indicated is not compelled to assert the unconstitutionality of the provisions of the Bankruptcy Act in order to justify his refusal to file schedules, when to be compelled to do so would violate his constitutional right against self-incrimination, so the appellant is not here contesting the general constitutionality of the provisions of Section 7 (a) of the Trading with the enemy Act, but is merely asserting that it could not have been intended that the enforcement of this Act should invade his constitutional privilege, and that when he has shown that such an invasion would result if he were required to report specific facts, then he may justify his alleged failure to make such a report.

(B) The Appellant Is Within the Rule in the Henry Case.

We understand that the rule laid down in the *Henry* and allied cases is this: in removal proceedings the writ of *habeas corpus* cannot be made to perform the function of a writ of error; the issues before the Commissioner are whether there is probable cause to believe, on all the evidence before him, that a crime has been committed as alleged in the indictment and that it has been committed in the jurisdiction to which removal is sought; that in the determination of these two basic questions the Commissioner is not required to determine exactly, as a Trial Court, doubtful questions of law or fact; that on questions of constitutionality the presumption is always in favor of the statute; and that consequently when a defendant opposes removal on the ground of the unconstitutionality of the statute under which he is charged, that question will not be passed upon, *unless it is generally, or in the particular case, "plainly and palpably void."* We do not understand that this Court has ever held or implied that a statute to be "plainly and palpably void" (the language of the Court in the *Henry* case) must be a statute palpably unconstitutional on its face, but on the contrary we submit that the result is precisely the same if it is "plainly and palpably void" or inoperative *in the particular case by reason of its effect on the particular defendant.* There is no philosophy demanding that, in removal proceedings, consideration of the constitutionality of a statute should be confined to the former case and not to the latter. On the contrary there would seem

less reason for hesitancy on the part of a committing magistrate to declare a statute inoperative in the case of a particular defendant under the particular facts presented in a given case. The learned Judge of the District Court indicated on the argument below that it was only when a statute was palpably and generally void on its face that the exception in the *Henry* case would apply and stated that the question of constitutionality would not be considered where it depended upon the facts in the particular case. We respectfully submit that in this he fell into error.

We now submit that from the preceding discussion the application of the Fifth Amendment to the present case "plainly and palpably" appears and, therefore, that within the rule in the *Henry* case, section 7 (a) of the Trading with the Enemy Act was "plainly and palpably" inoperative as to this defendant on the evidence before the Commissioner. *It should be remembered that all of the evidence germane to the present point was clear and that the Government offered absolutely no evidence to rebut it and in fact did not attempt to controvert it.*

To summarize the present point on the record before the Court:

*First.* The evidence as to the appellant's transactions in respect to the McClure Corporation and its stock *is clear and absolutely uncontroverted.*

*Second.* The proposition of law that these transactions constituted a "trading" for the benefit of an enemy, on all the evidence before the Commissioner, *is very clear and hardly subject to dispute.*

*Third.* The evidence that no license was obtained or applied for to carry on those transactions is *clear and absolutely uncontroverted.*

*Fourth.* The commission of an offense under the Act by so trading, *is hence very clear and hardly subject to dispute.*

*Fifth.* That the disclosure of the facts alleged in the Washington indictment would tend to show the commission of that offense, *is very clear.*

*Sixth.* That the constitutional protection against self-incrimination therefore applies *is very clear.*

*Seventh.* The provision of Section 7 (a) of the Act requiring the appellant to make that disclosure is therefore, "plainly and palpably void," as to him in this particular case.

*Eighth.* Within the doctrine of the *Henry* and allied cases, therefore, the question raised in this Point should have been considered by the District Court and the Commissioner.

*Ninth.* If that question had been considered, then we submit that the decision should have been that there was no probable cause to believe that the appellant had committed a crime as alleged in the Washington indictment, and therefore that the appellant should not be removed to that jurisdiction.

## POINT II.

**The District Court erred in holding that there was probable cause to believe that the appellant had committed within the District of Columbia (and only there) the offense charged by the Washington indictment.**

The removal of the appellant to the District of Columbia can legally be ordered only if the crime charged by the Washington indictment was committed in that district.

*Green* v. *Henkel,* (1901) 183 U. S. 249.
*Tinsley* v. *Treat,* (1906) 205 U. S. 20.
*Price* v. *Henkel,* (1909) 216 U. S. 488.

(A.) The Appellant Was Not Personally Present in the District of Columbia at the Time of the Alleged Offense.

The Washington indictment averred, with respect to each count, that the appellant "at the District of Columbia and within the jurisdiction of this Court did fail, neglect and omit to report to said Alien Property Custodian" the facts mentioned in that count. It appeared, however, from the testimony of the appellant that he had been a resident of New York City for the past four years and was not within the District of Columbia on December 20, 1917 (R., pp. 36, 84, 95), and the jurisdiction of the Court for the District of Columbia must, therefore, rest upon some ground other than the personal presence of the appellant within the District.

(B.) The Appellant Was Under No Duty to Make the Report in Question in the District of Columbia (and Only There) and the Situs of the Alleged Omission to Perform Such Duty Was Therefore Not Within that District.

The Trading with the enemy Act does not provide where the reports required by Section 7 (a) are to be filed or where they are to be made but merely provides that they are to be made "to the Alien Property Custodian by written statement under oath." For the purpose of fixing the situs of the offense in the District of Columbia, the indictment alleged that at the time of the commission of the offense the Alien Property Custodian had an office in the District of Columbia and at no place else. Most of the evidence before the Commissioner was on this point and he found that up to December 20, 1917, the only office designated or established by the Alien Property Custodian for the making of reports was in Washington, D. C. We understand that the appellant is bound in this proceeding by that finding of fact. On the basis of that finding the learned District Judge held that the Court for the District of Columbia had exclusive jurisdiction of the alleged offense, his theory being that it was the appellant's duty to report to the Alien Property Custodian wherever his office was and at no other place.

Inasmuch as the Act did not provide where the reports were to be filed and did not even fix the location of the office of the Alien Property Custodian but merely provided that the reports should be made "to the Alien Property Custodian by written statement under oath", we respectfully submit that this ruling of the learned District

Judge was erroneous and that the situs of the alleged offense could not be fixed by the mere fact that the Alien Property Custodian actually established his office in Washington for the receipt of reports. The evidence showed that the Alien Property Custodian was outside of the District of Columbia and within the Southern District of New York on official business several times within the period in question (R. p. 165). There is nothing in the Act to prevent the appellant from having made his report "to the Alien Property Custodian by written statement under oath" in New York and it follows that the duty of the appellant to make the report did not arise in Washington (or only there) or that the Court there did not have exclusive jurisdiction.

The decision of the learned District Judge was based upon the decision of this Court in *U. S.* v. *Lombardo* (1916), 241 U. S. 73, and the decision of the Circuit Court of Appeals for the Second Circuit in *New York Central & H. R. R. Co.* v. *United States* (1908), 166 Fed. 267. It is submitted that each of these decisions is distinguishable from the present case on two essential grounds: *first,* the statutes there provided that the reports should be *"filed"* with the Government official, thus importing delivery to and filing by him and hence importing the performance of these acts at his regular office; *second,* the statutes there specifically fixed the location of the office of the Government official and hence fixed the situs of the duty. The Trading with the enemy Act, on the other hand, contains neither of these provisions.

In the *Lombardo* case, the defendant was indicted in the Western District of Washington, un-

der the so-called White Slave Act, for failing to file with the Commissioner General of Immigration a statement in writing, setting forth certain facts with respect to alien women kept in a disorderly house in that District. A demurrer to the indictment was filed on the ground, among others, that the District Court for the Western District of Washington was without jurisdiction as the offense, if any, was committed in the District of Columbia. This Court held that the demurrer to the indictment on this ground was properly sustained, and in defining the offense, the Court quoted (p. 76) from the decision below as follows:

> "The gist of the offense is the failure 'to file with the Commissioner General of Immigration' a statement, etc. By the act of March 3, 1891, chap. 551, sec. 7, page 1085, 26 Stat. at Large, as amended by the act of March 2, 1895, chap. 177, 28 Stat., page 780, the office of the Commissioner of Immigration was created and his office fixed at Washington, D. C."

With reference to the Government's contention that the report might be *filed* by posting the report outside of Washington, D. C., addressed to the Commissioner General at Washington, D. C., and hence that the offense of failing to file would then be committed in the former place, the Court held that this was inconsistent with the meaning of the word "file" used in the statute, and on page 76 said:

> "This contention cannot be reconciled with the language employed in the act. The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered and the ordinary meaning applied. The word 'file' is derived

> from the Latin word 'filum', and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the United States mails. Gates *v.* State, 128 N. Y. Court of Appeals, 221. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier Law Dictionary; White *v.* Stark, 134 California, 178; Westcott *v.* Eccles, 3 Utah, 258; In re Van Varcke, 94 Fed. Rep. 352; Mutual Life Ins. Co. *v.* Phiney, 76 Fed. Rep. 618."

With reference to the effect of the statutory provision specifically fixing the location of the office of the Commissioner General of Immigration, the Court said on page 77:

> "It may be that where there is a general duty it may be considered as insistent both where the 'actor' is and the 'subject' is, to borrow the Government's apt designations, as in the case of the duty of a father to support his children; and if the duty have criminal sanction it may be enforced in either place. *The principle is not applicable where there is a place explicitly designated by law, as in Sec. 6.*" (Italics ours.)

In the present case there was no place explicitly designed by the statute, and therefore the language of this Court just quoted clearly indicates that the Court for the District of Columbia did not have exclusive (if any) jurisdiction. This decision is not, it is submitted, authority for the proposition that where a statute does not provide where the report is to be made, but simply provides that the report is to be made to an official

by written statement, the duty to report arises where, and only where, that official happens to establish his office.

In the *New York Central* case, the defendant was indicted in the Western District of New York for failing to file certain schedules of rates with the Interstate Commerce Commission. On appeal from conviction the defendant alleged as error that the offense was not committed in that District. The Circuit Court of Appeals sustained his contention on the ground that the Interstate Commerce Act specifically fixed the location of the principal office of the Commission in Washington, D. C., and that this fixed the situs of the duty to report and of the omission to perform such duty. In this case also the statute provided for a *filing* of the report.

In its brief below, the Government endeavored to analogize the present case to the *Lombardo* and *New York Central* cases by arguing that the Trading with the Enemy Act in effect did provide for "filing" the reports and this argument was based on the fact that the subdivision in question of Section 7 (a) concludes with a provision permitting the President to extend the time for "filing the lists or reports." It does not seem, however, that the expression above quoted, used with respect to the extension of time for making the reports, was used in the technical sense suggested. This provision for extension also relates to the lists of stockholders referred to in Section 7 (a) wherein it is provided that corporations, trustees, etc., shall "*transmit to* the Alien Property Custodian a full list sworn to" of enemy stockholders and directors, etc. The result of the Government's argument is thus that "transmit to" means "to file with", an unreasonable construction.

In a further attempt to analogize the present case to the *Lombardo* and *New York Central* cases, the Government claimed that the Trading with the enemy Act fixed the office of the Alien Property Custodian at Washington, D. C., by reason of two provisions of Sections 6 and 15 of the Act as follows:

Section 6 of the Act providing for the appointment of the Alien Property Custodian and stating his powers, contains the following clause:

> "The President may further employ in the District of Columbia, and elsewhere, and fix the compensation of such clerks, attorneys, investigators, accountants and other employees as he may find necessary for the due administration of the provisions of this Act."

A most casual reading of this provision shows that it does not fix the office of the Alien Property Custodian within the District of Columbia.

Section 15 which provides for an appropriation for the carrying out of the Act, states that the amount appropriated is:

> "is to be used in the discretion of the President for the purpose of carrying out the provisions of this Act during the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for the payment of salaries of all persons employed under this Act together with the necessary expenses for transportation, subsistence, rental of quarters in the District of Columbia, books of reference, periodicals, stationery, typewriters and exchanges thereof, miscellaneous supplies, printing to be done at the Government Printing Office, and all other necessary expenses not included in the foregoing."

This also is an attenuated ground on which to fix the situs of the office of the Alien Property Custodian in the District of Columbia. By its very terms the appropriation is not limited to the items enumerated but is to cover "all other necessary expenses not included in the foregoing." It cannot be relied on as fixing the office at this one place. This was not its purpose and it has never been so regarded. Thus, in the report of the Alien Property Custodian to the President dated January 1, 1918, (which was only ten days after the date of the alleged offense) [Appellant's Exhibit E (R., p. 192)], it is stated:

> "On December 8, 1917, the President allotted the sum of $25,000 to the Alien Property Custodian from the appropriation of $100,000,000 for "national security and defense" *to cover all expenses including rental of quarters outside of the District of Columbia.* There has been disbursed out of the allotment the sum of $758.99, making a total disbursement, etc."

We assume that the Government will hardly contend that this expenditure and the subsequent establishment of quarters in New York (R. pp. 56-62, 67-69, 141-144) were unauthorized.

It is submitted, therefore, that the learned Court below erred in holding that the Court for the District of Columbia had exclusive (if any) jurisdiction of the alleged offense and in holding that there was reasonable cause to believe that the alleged offense had been committed in that district.

## POINT III.

**The District Court erred in refusing to hold that the removal of the appellant to the District of Columbia would involve an invasion of his constitutional right to a speedy trial on the New York indictments.**

(A.) The Unreasonable Delay in the Trial of the New York Indictments Caused By These Removal Proceedings.

It appears from the preliminary discussion (*supra*, p. 2) that the appellant was committed on July 6, 1918, in the District Court for the Southern District of New York, and since August 2, 1918, has been preparing for trial on two indictments returned against him by the Grand Jury for that District. We have also pointed out (*supra*, p. 5) that on November 29, 1918, the Court in that district ordered a commission to take testimony abroad for the appellant but that the Government has delayed the execution of this commission and has stated that it will not be in a position to send its representative abroad for the taking of this testimony at least until the 1st of May, 1919, and has intimated that the commission should wait until the removal proceedings and all other preliminary matters are out of the way (*supra, p.* 7). Furthermore, the District Attorney has announced that the trial on the New York indictments will not take place until after the trial on the Washington indictment, and has further admitted that it will doubtless be necessary that a commission be issued to take testi-

mony abroad with respect to the Washington indictment (*supra*, p. 5). The result will necessarily be that in addition to the delay of over nine months which has already occurred, the trial on the New York indictments will be projected into the indefinite future. In view of the time which would be consumed by the appellant's right to move with respect to the Washington indictment, if required to plead thereto, the execution of the commission abroad and the great length of the trial in Washington due to the complicated issues involved, it is almost certain that the appellant's removal to Washington will delay the trial of the New York indictments until around the first of January, 1920, or eighteen months after the appellant was first committed in New York. For at least half of this delay the removal proceedings will be directly responsible, and it is submitted that this is an invasion of the constitutional rights of the appellant to a speedy trial in New York.

We recognize that a defendant ordinarily has no constitutional right to be tried first in the jurisdiction where he is first indicted but that his right to a speedy trial on either indictment is necessarily relative, dependent on all the circumstances of the case. In *Beavers* v. *Haubert*, 198 U. S. at page 87, this Court said:

> "The right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest—means of bringing a defendant to trial."

With full recognition of this principle, we submit that the circumstances of the present case will not warrant the further delay contemplated by the Government, and that to permit that delay will amount to a denial of the appellant's rights of a speedy trial accorded by the Fifth Amendment.

In *Haas* v. *Henkel,* (1909) 216 U. S. 462, this Court said at p. 475:

> "To say that the accused had a right to a speedy trial of the New York cases may be conceded. If unreasonable delay should result from continuances due to an election to try the same accusations in another district, a very different question might arise, calling for relief through habeas corpus. But such a possibility affords no legal reason for denying the right of removal."

Here the unreasonable delay is not a possibility, but must inevitably result.

In the case of *In re Tillinghast* (District Court for the District of Rhode Island) (1916), 233 Fed. 712, the Court stated at p. 713:

> "The fact that indictments for another offense are now pending in this district is not, under the present circumstances, a sufficient reason for a refusal to issue warrants of removal. At the hearing an inquiry was made by the court whether the defendants claimed the right to a speedy trial of the indictments pending in this court, and whether they claimed that the right to such speedy trial would be unreasonably delayed by the removal; but, though opportunity was offered, no such claim was made.
>
> There appears, therefore, no sufficient reason for denying the petition for warrants of removal. Haas *v.* Henkel, 216 U. S. 462, 475."

In the present case the appellant has consistently maintained throughout these proceedings, before the Commissioner, in his petition for writs of *habeas corpus* and *certiorari* in his briefs submitted to the Commissioner and to the District Court, and in his assignment of errors herein, that a trial of the New York indictments would be unreasonably delayed by this removal and hence that the removal would violate his constitutional right to a speedy trial.

(B.) This Point is Properly Raised in These Habeas Corpus Proceedings.

We understand that the Government's position on this point is that it should be raised by the appellant, not in these proceedings, but in a separate petition addressed to the District Court for the Southern District of New York demanding a speedy trial there.

This argument would seem to be sufficiently answered by the language of this Court in Haas *v.* Henkel just quoted (*supra*, p. 48) and furthermore, considered on general principle, it is unsound. Upon the present writ of *habeas corpus* the appellant is clearly entitled to relief from any restraint imposed in violation of his constitutional rights. He is now (though enlarged on bail to await this Court's decision) under restraint by virtue of, and as part of, the removal proceedings. If, therefore, the continuation of that restraint through the medium of his actual removal from New York will violate his constitutional right to a speedy trial, he is entitled to relief through this writ of *habeas corpus*.

In fact, it would seem that the present writ is

the only remedy that the appellant has, for if he is removed from New York to Washington, an appeal to the New York court for a speedy trial there would be futile, for that Court cannot compel the trial of a defendant who is in another jurisdiction. For like reason no writ of *habeas corpus* would lie in New York. On the other hand, there would be no way in which the appellant by petition to the Washington court or by writ sued out there could compel a prompt trial in New York.

It is submitted, therefore, that the removal of the appellant will violate his constitutional right to a speedy trial of the New York indictments and that the present proceeding is the proper, and indeed the only, one in which he may raise this question.

## POINT IV.

**Before granting its consent to the removal of the appellant from the Southern District of New York, the District Court should have required the Government to state its reasons for demanding such removal and should have given the appellant an opportunity to reply thereto.**

(A) The Consent of the District Court to the Removal of the Appellant was Necessary.

Under the general principle that, as between courts of equal authority, the one whose jurisdic-

tion first attaches is entitled to maintain it and that its consent is therefore necessary before that jurisdiction can be ousted, the appellant maintained before the Commissioner that it was incumbent upon the Government to secure the consent of the District Court for the Southern District of New York to the removal of the defendant because the jurisdiction of that court had first attached by reason of the appellant's commitment on the New York indictments (R., p. 167).

The general rule is stated in *In re Johnson* (1897), 167 U. S. 125, as follows:

> "Ever since the case of *Abelman* v. *Booth*, 21 How. 506, it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession."

It is submitted that the general principle of jurisdiction is not affected, as between Federal Courts of different districts, by the provisions of section 1014 of the Revised Statutes which provides for the removal of the accused from one district to another, for otherwise the exercise of its jurisdiction and functions by any Federal Court would be subordinate to, and subject to interruption at, the pleasure of the Attorney-General whenever additional charges in another court enabled him to institute removal proceedings.

The only references to this point which we have found among the opinions of this Court are in *Beavers* v. *Haubert* (1905), 198 U. S. 77, *Haas* v. *Henkel* (1910), 216 U. S. 462, and *Peckham* v. *Henkel* (1910), 216 U. S. 483.

In the *Beavers* case the Court said on page 86:

> "The Circuit Court, as we have seen in the case at bar, consented to the removal of the appellant, and we are not called upon to decide whether the Government had the right of election, without such consent, to proceed in New York or the District of Columbia."

In the *Haas* case also the Court pointed out that the consent of the Circuit Court had been obtained.

In the *Peckham* case the consent of the Circuit Court had not been obtained but the Court held that its consent was not necessary since the question was not whether the defendant should be tried in that district or in the district to which removal was sought but merely the question of whether the Government, having first sought to remove him from the Northern District of New York to the District of Columbia, could subsequently remove him from the Southern District of New York to the District of Columbia without having first obtained the consent of the court for the Northern District of New York.

This Court held that such consent was not necessary and on pages 486, 487, said:

> "The present case differs upon this point from that of Beavers *v.* Haubert, in that the consent of the court of prior jurisdiction was not obtained as in that. In that case the court reserved the question as to 'whether the Government had the right of election, without such consent', to proceed in either of the two districts in which indictments were pending. But there is here no question of electing whether to try in the Northern District of New York or in the District of Columbia, but whether it would elect, between the two re-

moval proceedings, the object of each being to remove the appellant to the same place for trial. The institution of the second removal proceeding without the consent of the Circuit Court for the Northern District of New York may very well be regarded as an election by the United States, the plaintiff in both cases to abandon the first complaint. But aside from this, and assuming, without deciding, that the removal proceedings were in disregard of the prior proceedings, and therefore erroneous, the jurisdiction of the commissioner was not affected. No constitutional right of the appellant was invaded. A petition for a writ of *habeas corpus* is not a writ of error. The error, if any, was a mere disregard of a rule of comity, which is not reversible in a proceeding of this character."

(B) How the Consent of the District Court Was Obtained.

The Commissioner ruled that the question of consent of the District Court could be passed upon by that court when application to it for an order of removal was made. In the argument before the District Court in the *habeas corpus* proceedings the point was raised and the appellant pointed out that the prior practice of the Attorney General, as evidenced by the reports in *Beavers* v. *Haubert* and *Haas* v. *Henkel, supra,* had been to explain to the Court the reasons why its consent to the removal proceedings was requested. In the opinion of this Court in the *Beavers* case, Mr. Justice McKenna, delivering the opinion, stated in the first paragraph, with reference to the proceedings first instituted (p. 84):

"The District Attorney, however, announced an intention not to proceed further

with the prosecution, and announced further that he intended to prosecute proceedings to remove appellant to the District of Columbia for trial. This was done, and with the consent of the court.

In the opinion of this Court in the *Haas* case, Mr. JUSTICE LURTON, delivering the opinion, stated near the beginning (pp. 471, 472):

"Pending these removal proceedings, and before any hearing, the United States district attorney moved the Circuit Court in which the New York indictments were pending for consent to the prosecution of these removal proceedings, and consent was granted over the objection of Haas. This application was made by direction of the then Attorney-General of the United States, who, in an official communication, said 'that should the trial here (Washington) result in acquittal or conviction, the indictments in New York will be dropped.' Among other reasons for desiring the trial in Washington, aside from mere questions of convenience to Government officials and witnesses, the Attorney-General said:

'1. The indictments charge a conspiracy on the part of the several defendants to cause to be issued at Washington by the Bureau of Statistics for the Department of Agriculture of false cotton crop reports, and that Holmes, who was then Associate Statistician of the Bureau of Statistics, was to furnish to his co-conspirators in advance of their official issue the information to be contained in the reports. While, owing to the commission in your district of acts in pursuance of the conspiracy, the court in your district has jurisdiction of the offense, yet the conspiracy was in all probability actually formed in Washington. The false reports were prepared and issued here

and the advance information was given out here. The real situs of the crime then is in the District of Columbia, and the trials should therefore be had here.

'2. The defendant Holmes has been arrested and is now awaiting trial on the indictments pending in the District of Columbia. There are two series of these indictments, one against Price, Haas and Holmes, and the other against Haas, Peckham and Holmes. It would be a great convenience and a vast saving to the Government to try the defendants together. Even this would necessitate two trials, one in each series. If the non-resident defendants are not removed to Washington, four trials would be needed, two in Washington and two in New York.' ''

In the above cases the Government frankly, fully and in open court stated its reasons for requesting the Court of prior jurisdiction to surrender the defendant and permit him to be removed. *In the present case the Assistant District Attorney, notwithstanding the insistence of the appellant to know the reasons for the attempted removal, so that he could address the Court on the question of whether they should prevail, not only carefully refrained from stating them but at the argument before the District Court expressly requested the Court not to compel him to state the reasons!* And this position was taken in spite of the fact that in the present case (unlike most, if not all, of the previous removal cases, where the indictments in the two jurisdictions were handed down within a short time of each other) the appellant had been led to believe that his trial would be in New York, had engaged counsel and undergone the expense of preparing for trial there, had moved for and obtained the consent of the Court there for the issuance of a commission

to take testimony abroad and then, without a word of explanation and after a period of several months, had suddenly been confronted by this attempt to remove him to a strange jurisdiction, a move which would subject him to the additional expense and burden of engaging new counsel and of transporting his witnesses and documents to the new jurisdiction, in which, however, from the nature of the case, he would be able effectively to assemble only part of the evidence he should have for the conduct of his defense in court. And all this is attempted on the basis of new charges which, though technically different, involve the same transaction and the same major issues! Can it be that under such circumstances the Government may properly insist that its reasons for this extraordinary and apparently oppressive action should be kept in the dark and unknown to the appellant? We think not and respectfully venture to suggest to this Court that it disapprove such practice. If the District Court had a discretion to grant or withhold its consent to removal and the exercise of that discretion was so vital to the appellant, we are unable to see any reason why the furtherance of justice required that the ordinary rule should not be followed that a party invoking the action of a court in his favor should state his grounds therefor and that the other party should be given an opportunity to reply thereto.

### (C) This Question Is Not Academic.

It may be argued that as the District Court has given its consent, the reasons actuating it are immaterial and that in any event this Court intimated in its opinion in the *Peckham* case (quoted above, p. 52) that the appellant has no right in

*habeas corpus* proceedings of this nature to raise such a question. But in *Hyde* v. *Shine* (*supra*, p. 9) this Court expressed its opinion regarding certain phases of removal practice and if the Court will in its opinion in the present case announce that under circumstances such as were presented here, it would have been better practice for the Government to have stated its reasons for requesting the District Court's consent to the removal of the appellant and to have given the appellant an opportunity to reply thereto, we feel confident that the District Court will, before the warrant of removal is signed, hold a hearing accordingly and grant the appellant the opportunity which he deems so important. Certainly the consent which the District Court has already given is not irrevocable until the warrant of removal is signed and executed.

## CONCLUSION.

**The order of the District Court should be reversed and the appellant discharged from custody.**

Respectfully submitted,

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